INDEX

PAGE

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. As Construed, The Illinois Obscenity Statute, Ill. Rev. Stat., (1969), Ch. 38, Sec. 11-20, Meets The Specificity Requirement Of Part (B) Of The Test Enunciated By This Court In *Miller* v. *California*, 413 U.S. 15 (1973) 3

II. The Publications Involved In The Instant Case Are Not Protected By The First Amendment Since They Are Obscene 5

CONCLUSION 6

AUTHORITIES CITED

Cases

City v. *Geraci*, 46 Ill. 2d 576 (1970) 4

Hamling v. *United States*, 94 S. Ct. 2887 (1974) 3

Jenkins v. *Georgia*, 94 S. Ct. 2750 (1974) 6

Jenkins v. *State*, 199 S.E. 2d 183 (Ga. 1973) 5

Miller v. *California*, 413 U.S. 15 (1973) 3

People v. *DeVilbiss*, 41 Ill. 2d 135 (1968) 4

People v. *Enskat*, 109 Cal. Rptr. 433 (1973) 4

People v. *Heller*, 33 N.Y. 2d 314 (1974) 4

People v. *Hume*, —— Ill. 2d ——, —— N.E. 2d —— (1975) (Slip Opinion Attached as Appendix A) 3

People v. *Ridens*, 51 Ill. 2d 50 (1972) 3, 5

Roth v. *United States*, 354 U.S. 476 (1957) 4

State ex rel. Chobot v. *Circuit Court for Milwaukee Co.*, 212 N.W. 2d 690 (Wis. 1973) 4

State v. *Little Art Corporation*, 15 Cr. L. 2078 (Neb. 1974) 5

Smith v. *United States*, 505 F. 2d 824 (6th Cir. 1974) .. 5

United States v. *B. & H. Distribution Corp.*, 375 F. Supp. 136 (W.D. Wis. 1974) 5

United States v. *Miller*, 505 F. 2d 1247 (9th Cir. 1974) . 5

United States v. *Thevis*, 484 F. 2d 1149 (5th Cir. 1973) . 5

IN THE

Supreme Court of the United States

No. 74-1003

FRANK C. RIDENS, MARILYN KECKLER and LARRY WALKER,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The relevant facts are adequately set forth in the Statement of the Case included in the instant Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

AS CONSTRUED, THE ILLINOIS OBSCENITY STATUTE, ILL. REV. STAT., (1969), CH. 38, SEC. 11-20, MEETS THE SPECIFICITY REQUIREMENT OF PART (B) OF THE TEST ENUNCIATED BY THIS COURT IN *MILLER* v. *CALIFORNIA*, 413 U.S. 15 (1973).

In *People* v. *Ridens*, et al., 59 Ill. 2d 371, —— N.E. 2d —— (1974), the Illinois Supreme Court held that the Illinois Obscenity Statute was not impermissibly vague when measured against the specificity requirement of part (b) of the *Miller* test. The court also expressly stated that parts (a) and (b) of the *Miller* test were being incorporated into the Illinois Statute. *People* v. *Riden, supra* at 374-5; also see *People* v. *Hume*, —— Ill. 2d ——, —— N.E. 2d —— (1975) (Slip Opinion attached hereto as Appendix A). The Illinois statute in pertinent part reads:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

Respondent submits that this courts decision in *Hamling* v. *United States*, 94 S. Ct. 2887 (1974) once and for all puts to rest petitioners' contention that the Illinois Statute is impermissibly vague in light of *Miller* and that any construction of the statute so as to comply with *Miller* can not be applied retroactively as to their conduct. In *Hamling* petitioners were convicted under the federal obscenity

statute, 18 U.S.C. Sec. 1461, prior to the *Miller* decision. They claimed that 18 U.S.C. sec. 1461 did not contain in its language, nor had it been construed to apply to specific types of sexual conduct referred to in *Miller* and therefore the section was unconstitutionally vague as applied to them. This Court rejected the contention stating that prior decisons including *Roth* v. *United States,* 354 U.S. 476 (1957), had limited the application of 18 U.S.C. sec. 1461. The Court also incorporated the *Miller* test into 18 U.S.C. sec. 1461 and applied the construction to the petitioners. 94 S. Ct. at 2904-2906. Likewise the Illinois Statute, which is much more specific on its face than the federal statute, had been limited in its application by Illinois case law. The same cases cited by this Court in *Hamling,* including *Roth,* as limiting 18 U.S.C. 1461, have been cited by the Illinois Supreme Court in limiting the Illinois Statute. See, *City* v. *Geraci,* 46 Ill. 2d 576 (1970); *People* v. *DeVilbiss,* 41 Ill. 2d 135 (1968); *People* v. *Ridens,* 51 Ill. 2d 501 (1972). Similarly, the Illinois Supreme Court's construction of the Illinois Statute so as to incorporate the *Miller* standard and its application to the instant petitioners, is no more constitutionally impermissible that the Supreme Court's construction and application of the federal statute. In this context it is important to note that the cases cited by petitioner for the proposition that "other jurisdictions with obscenity statutes similar to Illinois have held them unconstitutionally vague in light of . . . *Miller*" (page 9 of Petition) were decided prior to *Hamling.* Further respondent submits that most courts that have considered the issue have upheld obscenity statutes. See, *State ex rel. Chobot* v. *Circuit Court for Milwaukee Co.,* 212 N.W. 2d 690 (Wis. 1973); *People* v. *Heller,* 33 N.Y. 2d 314 (1974); *People* v. *Enscat,* 109 Cal. Rptr. 433,

(1973); *Jenkins* v. *State*, 199 S.E. 2d 183 (Ga. 1973); *State* v. *Little Art Corporation*, 15 Cr. L. 2078 (Neb. 1974); *United States* v. *B&H Dist. Corporation*, 375 F. Supp. 136 (W.D. Wis. 1974); *United States* v. *Thevis*, 484 F. 2d 1149 (5th Cir. 1973); *Smith* v. *United States*, 505 F. 2d 824 (6th Cir. 1974); *United States* v. *Miller*, 505 F. 2d 1247 (9th Cir. 1974).

The Illinois Obscenity Statute on its face and as authoritatively construed meets the requirements set forth in *Miller*.

II.

THE PUBLICATIONS INVOLVED IN THE INSTANT CASE ARE NOT PROTECTED BY THE FIRST AMENDMENT SINCE THEY ARE OBSCENE.

The nature of the materials involved were discussed by the Illinois Supreme Court in the first opinion in *People* v. *Ridens*, 51 Ill. 2d 410, 417 (1972):

> "The remaining issue for consideration is the propriety of the trial court's judgment that these publications are obscene as a matter of law. The color photographs, of which these magazines are almost exclusively composed, portray nude males and females, engaged in seductive embraces, posed with their legs spread so as to focus attention on their genitals. Although none of the models portrayed is actually engaged in sexual activity, it is clear from some sequences of photographs that sexual activity is suggested and imminent. The models in many instances have their hands, or mouths, close to another's genitals, suggestive of abnormal sexual conduct. The females are posed with their heads close to the male sex organ, and vice versa. In some of the pictures, several of the naked males and females are photographed

while lying on top of one another, and in other pictures, two females are shown suggestively embracing and fondling one male. In these pictures, the focal point is the genitals of the parties.

We find that the sole appeal of these magazines is to the prurient interests; the dominant theme of these publications is to a morbid interest in nudity and sex. The scenes shown and the detail in the photographs are patently offensive in that such depiction goes beyond the customary limits of candor in this State. Not one of these magazines has any literary or artistic merit and they are utterly without redeeming social value. They are all obscene."

Unlike the movie "Carnal Knowledge" considered by this Court in *Jenkins* v. *Georgia*, 94 S. Ct. 2750 (1974), the present materials focus on the genital areas of the models. The method of exhibiting the genitals, the positions and actions of the models render the pictures lewd. As a result the materials involved herein are obscene under either the *Miller* or pre-*Miller* test.

CONCLUSION

For the reasons stated above, respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Docket Nos. 46523-46526 cons.—Agenda 4—

January, 1975.

THE PEOPLE OF THE
SATE OF ILLINOIS, Appellant,

v. HUME, INC., *et al.*, Appellees.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

The People appeal directly to this court (Rule 302(a)(1)) from the judgment of the circuit court of McHenry County holding the Illinois obscenity statute (Ill. Rev. Stat. 1971, ch. 38, par. 11-20) unconstitutional and dismissing four complaints charging defendants with obscenity. The complaints charged that defendants "exhibited an obscene motion picture, to-wit: an untitled underground co-feature."

Both the judgment of the circuit court and the filing of the People's brief in this court preceded the announcement of our second opinion in *People* v. *Ridens,* 59 Ill. 2d 362. In their brief, filed subsequent to the announcement of *Ridens,* defendants seek to persuade us that our judgment in *Ridens* was wrong. We have considered the arguments made and the authorities cited and adhere to our prior decision.

Defendants contend that if this court adheres to its decision in *Ridens,* this judgment must nevertheless be affirmed for the reason that retroactive application of the "authoritative construction" of the obscenity statute to this case is constitutionally impermissible.

In order to understand defendants' argument it is necessary to compare the pertinent portions of the *Roth-Memoirs* standards enunciated by the Supreme Court (*Roth* v. *United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304; *Memoirs* v. *Massachusetts*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975) with those stated in *Miller* (*Miller* v. *California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607).

Under the *Roth-Memoirs* standards, so far as here pertinent, in order to hold that material was obscene it was necessary to establish that "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." (383 U.S. 413, 418, 16 L. Ed. 2d 1, 6, 86 S. Ct. 975, 977.) Under the *Miller* standards the "basic guidelines" are "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations], (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." 413 U.S. 15, 24, 37 L. Ed. 2d 419, 431, 93 S. Ct. 2607, 2614-15.

Defendants argue that under *Miller* evidence of contemporary community standards is admissible only on the question of (a) appeal to the prurient interest, and is not admissible on the question of (b) patent offensiveness of the sexual depiction in question. This supposed limitation, defendants contend, prejudices them, for the reason that at the time the complaints were filed, under *Roth- Memoirs*, they could have introduced evidence of contemporary community standards on the question of whether the

material was patently offensive. They argue that such retroactive application of the law will deny them substantial constitutional guarantees of notice and due process.

In *Ridens,* in rejecting defendants' contention that the construction of the statute could be applied only prospectively we said: "Our holding that section 11-20 of the Criminal Code and the Moline obscenity ordinance are construed to incorporate parts (a) and (b) of the *Miller* rather than the *Memoirs* standards may not be applied retroactively if to do so renders their construction less favorable to defendants. *(People* v. *Patton,* 57 Ill. 2d 43, 48.) In our opinion the changes do not have the effect, and we find no impediment to the retroactive application of the statute and ordinance as now consrued." 59 Ill. 2d 362, 374-5.

On this record we need not and do not engage in conjecture concerning the nature of the proof which defendants will offer, and of course, the appropriate time to determine the admissibility of evidence is when it is offered. At this time we are unable to say whether and in what manner the statute as now construed is less favorable to defendants than as formerly construed, and therefore we find no impediment to its retroactive application in this case.

For the reasons stated the judgment of the circuit court of McHenry County is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.